2001

State of Utah v. Daniel L. Peck : Brief of Appellant

Utah Supreme Court

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.
S. Rex Lewis; Howard, Lewis and Petersen; Attorney for Appellant.
Vernon B. Romney; Attorney General; Noall T. Wootton; Attorney for Plaintiff-Respondent.

14137

IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

vs.

DANIEL L. PECK,

Defendant-Appellant.

Case No. 14,137

APPELLANT'S BRIEF

AN APPEAL FROM A JURY VERDICT
IN THE FOURTH JUDICIAL DISTRICT, IN
AND FOR UTAH COUNTY, STATE OF UTAH

S. REX LEWIS, for:
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84601
Attorneys for Defendant-Appellant

VERNON B. ROMNEY
Attorney General
State of Utah
263 State Capitol
Salt Lake City, Utah 84114

NOALL T. WOOTTON
County Attorney
County Building
Provo, Utah 84601
Attorney for Plaintiff-Respondent

TABLE OF CONTENTS

AUTHORITIES CITED

STATUTES CITED

IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH,	:	
	)	
Plaintiff and Respondent,	:	
	)	
vs.	:	Case No. 14,137
	)	
DANIEL L. PECK,	:	
	)	
Defendant and Appellant.	:	

APPELLANT'S BRIEF

NATURE OF THE CASE

This is an appeal from a jury verdict in which the defendant was charged with aggravated assault and was found to be guilty in that he did, with unlawful force and violence, knowingly and intentionally cause serious bodily injury to another.

DISPOSITION IN LOWER COURT

The matter was tried on March 20, 1975, before a jury. The State accused the defendant of violating 76-5-102(1)(2) and 76-5-103(1)(a), Utah Criminal Code Amended, which violations are a felony of the third degree. The jury found the defendant guilty as charged.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment and a new trial.

STATEMENT OF FACTS

Daniel Peck was charged with the offense of aggravated assault. The alleged assault rose out of a fist fight involving Daniel Peck, Jimmy Peck, Clarence "Junior" Nielson, Jr., and Garv Ewell. The fight occurred on Saturday, December 7, 1974, at ap-

proximately 1:15 p.m., in American Fork, Utah. (Tr. 14)

Accusations by Junior Nielson that the Peck boys had stolen some Christmas trees led to the fracus. The incident eventually leading to the fight was a night-time visit to Jimmy Peck's home on December 7, 1974, at 1:00 a.m. by Clarence Nielson. Nielson, the owner of a Christmas tree lot in American Fork, told Jimmy's wife that the Peck brothers had stolen Christmas trees from him. The next morning, Jimmy Peck's wife told him of these accusations made by Nielson. The charges so incensed Jimmy that he telephoned Nielson. A heated conversation ensued. The aftermath was that Ewell and Nielson were challenged to a fist fight. Ewell and Nielson responded and met the two Peck brothers at Sam White's lane in American Fork. (Tr. 15)

Junior Nielson and Jimmy Peck squared off while Ewell and Danny Peck watched. The Peck boy appeared to be winning the fight when Junior, (Tr. 17) who had a headhold on Jimmy (Tr. 34) then let him go and stopped fighting, whereupon Ewell, fresh and well-rested, commenced to fight a tired Jimmy Peck, who doggedly fought Ewell all the while retreating down the street. They continued to fight out into an open field. Danny Peck and Junior Nielson watched and were joined by Harry Peacock, who also was a spectator. (Tr. 15)

The State claims that at this point, when the fighters were in the field and the fight was almost finished, that Daniel Peck, of diminutive size, who had been an observer watching from his vehicle suddenly emerged with a slag hammer and "rushed over, took a swing with the slag hammer, and tore Gary Ewell's eye out." (Tr. 6)

Danny Peck claims he thought his brother was being killed by Junior Nielson and Gary Ewell when they both had Jimmy down, one gouging Jimmy's eyes, and the other getting him by the hair so they could either kick or hit him in the face. At this point, Danny, thinking his brother's life was endangered, intervened with a piece of metal and struck Junior, who was gouging Jimmy's eyes. Gary Ewell, who lost his eye, was in back of Danny Peck and as Danny turned, "the metal apparently hit Ewell in the eye." (Tr. 10)

Jimmy Peck testified: (Tr. 69)

> . . .He (Nielson) hit me and I fell down, and he crawled on top of me and was hitting me, and I rolled over on my stomach to cover myself up so he couldn't hit me in the face. I just rolled over on my stomach and he was on my back, Junior was, and he was hitting me on the back, and he grabbed me by the face like this and tried to pull my head up. He had his fingers in my face like this and digging my face and eyes trying to pull my face up. I had my head down and my hands up trying -- so he couldn't hit me, and then someone come over and grabbed me by the hair of the head trying to pull my head up.

The defendant, Daniel Peck, testified: (Tr. 78)

> A. At that time Junior was on Jimmy's back and had his fingers in his eyes pulling his head back, and Ewell had his head up like that by the hair and was lifting his head up and either Junior or Ewell, one of them, was saying, "Get his head up to where I can get him or kick him." something to that effect.
>
> Q. What was your reaction to this at this time?
>
> A. Well, I could see they wasn't going to quit and I had asked them three or four times. And I didn't know what else to do, so I just --
>
> Q. What did you say to them?
>
> A. I told them to quit and leave him alone, and Junior pushed me back in the car and took a swing at me the first time, and then I asked them three or four times to quit and leave him alone and quit pounding on him, and they just --
>
> . . .

Q. What was Ewell doing particularly as far as Jimmy was concerned?

A. He had him by the hair of the head and was lifting him up by the hair of the head and he had his hand back like that. (Indicating)

Q. What did you do?

A. I jumped out of the car and I grabbed this bar that I had in the back of the car and I hit Junior with it and he fell off, and as I did I seen Ewell coming and I turned around like that, and when I did that is when it hit Ewell.

Q. Did you swing the bar at Ewell?

A. I didn't swing it at him actually, no.

Q. What did you do? You say you turned around.

A. I seen him coming when I hit Junior, and I turned around like that and I felt it hit him. Then I looked at him and he had his hands on his eye, and then that was the first I even knew I had hit him.

POINT I

THE COURT'S FAILURE TO INSTRUCT ON THE LESSER-INCLUDED OFFENSE OF SIMPLE ASSAULT WAS PREJUDICIAL ERROR BECAUSE A CONVICTION OF THE DEFENDANT FOR SIMPLE ASSAULT WOULD BE WARRANTED BY ANY REASONABLE VIEW OF THE EVIDENCE.

The well-established general rule is that a jury should be instructed on lesser-included offenses when such a conviction would be warranted by any reasonable view of the evidence. Section 77-33-6, U.C.A., 1953, as amended, provides:

> The jury may find the defendant quilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment or information, or of an attempt to commit the offense.

The offense of simple assault is necessarily included in the offense of aggravated assault with a deadly weapon. State v. Hun-

ter, 20 Utah 2d 284, 437 P.2d 208 (1968); State v. Barkas, 91 Utah 574, 65 P.2d 1130 (1937); State v. Nielson, 30 Utah 2d 19, 514 P.2d 535 (1973). The elements of assault are common in both offenses.

The Utah Supreme Court has affirmed the general rule requiring the submission of lesser-included offenses when the evidence and circumstances so justify. State v. Johnson, 112 Utah 130, 185 P.2d 738 (1947); State v. Castillo, 23 Utah 2d 70, 457 P.2d 618 (1969); State v. Gilliam, 23 Utah 2d 372, 463 P.2d 811 (1970).

As case authority, defendant cites State v. Close, 28 Utah 2d 144, 499 P.2d 287 (1972), in which the defendant was charged with indecent assault on a child under fourteen years of age while in a public swimming pool in the middle of the afternoon while he was playing with a number of children and performing various gymnastics by tossing them about and flipping them over in the water. After being convicted, the defendant, on appeal, complained of the court's failure to instruct the jury on the lesser-included offense of simple assault. The Utah Supreme Court reversed for failure to so instruct and Justice Crockett, speaking for the Court, said:

> Though it is not our prerogative to pass upon the weight or credibility of the evidence, we are concerned with whether there is a basis therein which would justify a verdict of guilty of the lesser offense. Id. at 288.

It was held error for the trial court to not so instruct on the lesser-included offense because there was a basis in the evidence that would justify a quilty verdict on the lesser-included offense.

Even the rationale of Justice Ellett's dissent in State v.

Close, supra, supports appellant's position. Justice Ellett, dissenting, stated:

> The law seems to be that the failure to instruct on a lesser and included offense would be error only if the defendant can show that the jury upon evidence before it might rationally acquit him of the greater charge and convict him of the lesser. Id. at 289.

In accord with the dissent, the defendant presented evidence in the instant case that might lead the jury to rationally acquit him of the greater charge of aggravated assault and still convict him of the lesser charge of simple assault.

Simple assault is statutorily defined as "an attempt, with unlawful force or violence, to do bodily injury to another." Aggravated assault is statutorily defined as involving one who "uses a deadly weapon or such means or force likely to produce death or serious bodily injury."

The instructions given as to the crime alleged must be applicable to the testimony introduced at trial. In the instant case, there was evidence in the record that Daniel Peck thought that Jimmy Peck's life was endangered. Danny Peck testified (Tr. 78):

> A. At that time Junior was on Jimmy's back and had his fingers in his eyes pulling his head back, and Ewell had his head up like that by the hair and was lifting his dead up and either Junior or Ewell, one of them, was saying, "Get his head up to where I can get him or kick him," something to that effect.
>
> Q. What was your reaction to this at this time?
>
> A. Well, I could see they wasn't going to quit and I had asked them three or four times. And I didn't know what else to do, so I just --

Danny Peck testified he did not intend to cause serious bodily injury to Gary Ewell. He was only trying to defend his bro-

ther from what appeared to him to have become a deadly assault by two persons against Jimmy Peck. Daniel Peck testified to the effect that he had no intention of injuring Gary Ewell. (Tr. 80)

> **A.** I seen him (Gary Ewell) coming when I hit Junior, and I turned around like that and I felt it hit him. Then I looked at him and he had his hand on his eye, and then that was the first I even knew I had hit him.
>
> Q. Did you intend to hit Ewell at that time?
>
> A. No, I didn't.

The blow struck was accidental. It is clearly inferable from the defendant's testimony that he did not have the intent to commit serious bodily injury required of the crime of aggravated assault and instead could be found quilty of the lesser-included offense of simple assault. Daniel Peck, by his own testimony, raised the issue of his state of mind as to whether he intended serious bodily injury to the victim. He clearly testified of a lack of intent to do serious bodily injury to Ewell.

As further case authority, appellant cites State v. Barkas, supra, in which defendant Barkas, who was a sheep-herder, was with his sheep in the mountains west of Bingham when Cordova, a former sheep-herder of Barkas', climbed up to the mountains toward the camp to collect the sum of $4.28 which he claimed Barkas owed him. As Cordova came over a ridge, he saw Barkas coming over the next ridge and went down into the draw and met him. Barkas who had a shotgun in his right hand and a revolver in his left, asked Cordova what he was doing there. Cordova replied he had come up to collect the $4.28 due him. Without further words Barkas raised both weapons and pointed them at Cordova. Cordova

grabbed the hand that held the revolver and attempted to push it down. Barkas tried to raise the arm and pistol. In the struggle, the pistol was discharged, wounding Cordova in the leg. Cordova, under orders, started down the trail. After going about 100 yards, Barkas ordered him to stop and pull down his pants to see if he had been shot. Cordova replied that he had not been hit. Barkas then accused Cordova of being up there stealing sheep. Barkas was prosecuted for assault with a deadly weapon with intent to do bodily harm and was convicted. On appeal, Barkas raised the issue of whether the trial court should have properly instructed on the lesser-included offense of simple assault. The Utah Supreme Court said such an instruction should have been given and reversed the trial court's decision, stating:

> And if the jury believed Cordova's story of how the shooting occurred, they might well find a verdict on a lesser charge. Cordova testified that without words spoken defendant pointed a pistol at him with one hand, and a shotgun with the other hand, and demanded to know what he was doing there. This, if done with the intention of frightening, or intimidating or interfering with Cordova would constitute a technical or simple assault, which is a threat or attempt to interfer with one's sense or feeling of physical security and put one in fear for his safety. Cordova further testified that he grabbed defendant's pistol arm, and in the struggle the pistol was discharged wounding him in the leg. This is not inconsistent with the conviction that the shooting was accidental and not done intentionally to hurt Cordova, in which event it would only be a simple assault. Such conclusions are not beyond reason, and the jury should have been permitted to consider them and pass upon them. Id. at 1132 & 1133. (emphasis added)

In both State V. Barkas, supra, and the instant case, the defendants were charged with assault with a deadly weapon. In both cases the defendant testified that the wound inflicted was

accidental. The crime of simple assault may be committed by a wanton or reckless act. 6 Am.Jur.2d, Assault and Battery, §14. It is defendant's contention that if the victim was not wounded intentionally but rather was wounded accidentally as a result of defendant's wanton and reckless act then there would be committed only a simple assault. Such a conclusion is not beyond reason in the instant case because there was evidence before the trier of facts indicating that such was the case.

In State v. Hyams, 64 Utah 285, 230 P. 349 (1924), the defendant was charged with an assault with intent to feloniously and by force and violence carnally know and ravish a married woman not his wife. Defendant's counsel requested the court to charge that although the defendant was charged with the offense of assault to commit rape, the jury might neverthe less find him quilty of simple assault. The court refused to so charge and counsel assigned the court's refusal as constituting prejudicial error. The Utah Supreme Court reversed the trial court's conviction stating:

> It might well be the case that, although a trial court had refused or omitted to submit to the jury the question of included or lesser offenses, the judgment would nevertheless not be reversed for that reason alone, if the evidence was of such a nature as would not justify a finding of an included or lesser offense. In such event no prejudice would result from the mere fact that the question of included or lesser offenses was not submitted to the jury. It is, however, always a delicate matter for a trial court to withhold from the jury the right to find the accused guilty of a lesser or included offense, and determine the question of the state of the evidence as matter of law. That should be done only in very clear cases. Id. at 350.

The state of the evidence in the instant case is not so clear cut

as to require an instruction only on aggravated assault.

Other jurisdictions are in accord with the Utah Supreme Court. See Holland v. State, 414 P.2d 590 (Okla.,1966), in which the Nevada Supreme Court stated:

> . . .it was not incumbent upon the court to instruct on the lesser offense if the evidence clearly shows the commission of the more serious crime charged and no other interpretation of the defendant's conduct was reasonably possible. Id. at 591.

The evidence in the instant case did not unequivocably and clearly show guilt above the lesser--included offense of simple assault. The evidence in the instant case was insufficient to remove a reasonable doubt, which might be in the minds of the jury, as to Danny Peck's intent. Under the same evidence, Peck might be found quilty of simple assault because the proof necessary to establish the intent to use a deadly weapon to inflict serious bodily injury or death upon Gary Ewell was lacking but there was sufficient evidence to establish the crime of simple assault upon the victim. Also see State v. Jaramillo, 82 N.M. 548, 484 P.2d 768 (1971); Gist v. State, 509 P.2d 149 (Okla. 1973); People v. Velasquez, 497 P.2d 12 (Colo. 1972). Also see State v. Lytle, 177 Kan. 408, 280 P.2d 924 (1955), in which the Supreme Court of Kansas stated:

> There is no doubt that the trial court in any criminal proceeding must instruct on all lesser degrees of the crime charged irrespective of the weight of evidence touching thereon if there is any evidence. Id. at 928. (emphasis added)

The late timing of defendant's exceptions to the instructions which were done after the jury returned a verdict is not fatal to

its appeal. Judge Henroid, in State v. Close, supra, stated:

> Hence, an objection or exception taken after the jury's retirement, for my money is just as valid an exception,--and more so,--than one taken before--and has as much stature on appeal in spite of the dissent's implication that is hasn't. The fact that the exception was made after the jury verdict seems inconsequential. Id. at 289.

Danny Peck, the defendant, was charged with aggravated assault. Under a reasonable view of the evidence, the accused could have been found guilty of simple assault and, therefore, it was prejudicial error and deprived him of a substantial right when the court failed to instruct on simple assault.

POINT II

IT WAS PREJUDICIAL ERROR FOR THE COURT TO PREVENT THE DEFENDANT FROM TESTIFYING AS TO HIS STATE OF MIND BECAUSE SUCH EVIDENCE WAS ESSENTIAL TO DEFENDANT'S PLEA OF DEFENSE OF A THIRD PARTY.

The state of mind of the defendant in assault cases is important in the determination of whether a person is privileged to defend a third person from serious harm. Judge Sorensen did not allow Daniel Peck to testify as to his state of mind. (Tr. 78 and 79)

> Q. What was your apprehension, if any, as far as your brother concerned?
>
> MR. WOOTTON: We object.
>
> THE COURT: I will sustain the objection.
>
> Q. (By Mr. Lewis) Tell us what your reaction was at this time.
>
> A. Well, it looked to me like --
>
> MR. WOOTTON: We object.
>
> THE COURT: I will sustain the objection.

He can testify as to what happened and what was said, Mr. Lewis. Not his personal feeling.

MR. LEWIS: I think I am entitled to inquire the reason therefor.

THE COURT: I will sustain the objection. Proceed.

The intention of Danny Peck was an integral part of his plea of self-defense. In Carter v. State, 507 P.2d 932 (Okla. 1973), the Court stated:

> The law recognizes that a person is privileged to defend a third person from harm under the same conditions and by the same means as though under and by which he is privileged to defend himself, if he reasonably believes that the circumstances are such as to give the third person such a privilege of self-defense, his intervention is necessary for the protection of the third person, and the third person is a member of his immediate family or a person whom he is under a legal or socially recognized duty to protect. Restatement, Torts, §76. 6 Am.Jur.2d, Assault and Battery, §152. Id. at 933 and 934. (emphasis added)

The general rule is stated in 1 Jones on Evidence, §4:55 (6th ed. 1972), thus:

> While there are authorities holding that a party may not testify directly concerning his own uncommunicated mental status, motives or intent, and that such matters must be shown by proof of facts and circumstances attending the transaction in dispute, it is the general rule, applicable in civil and criminal cases alike, and sustained by the great weight of authority, that whenever the motive, intention or belief of a person is in issue, the direct testimony of such person whether he is a party to the suit or not, is relevant to the issue of such motive, intent or belief, notwithstanding the fact that his interest may tend to diminish the credit to be accorded to his testimony. Such testimony has been admitted in vary-

ing situations.

Such testimony was admitted in State v. Stenbach, 78 Utah 350, 2 P.2d 1050 (1931), in which the Utah Supreme Court, in reversing a conviction of murder in the first degree, stated:

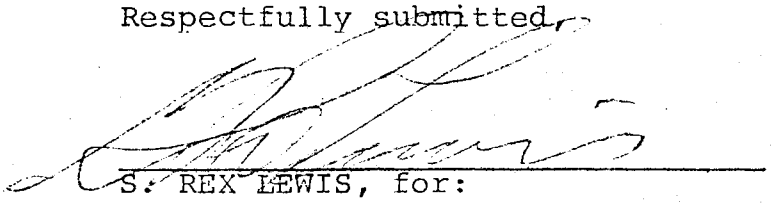
> The question of whether the defendant did or did not intend to kill the deceased goes to the very essence of the crime charged. "In every crime or public offense, there must exist a union or joint operation of act and intent, or criminal negligence." Comp. Laws Utah 1917, § 7908. The intention to take the life of Mrs. Mantyla is an essential an element of the crime of murder in the first degree as is the killing itself. We quote the following from Jones Commentaries on Evidence (2d Ed.) vol. 2, § 713, pp. 1336, 1337: "Now that defendants are permitted to testify in their own behalf, there can be no valid reason assigned why they should not be allowed to testify to the intent with which any act was done, where such intent is a fact necessary to be ascertained." Id. at 1056 and 1057.

Judge Sorensen's failure to allow the defendant to testify as to his intention was prejudicial because it emasculated the defendant's plea of self-defense.

CONCLUSION

The Court's failure to allow the defendant to testify as to his intention and its failure to instruct on simple assault deprived the defendant of precious and fundamental rights and violated the principle that the Court must submit the case to the jury for consideration on every degree of assault which the evidence, in any reasonable view, suggests, therefore, the verdict should be reversed and a new trial ordered.

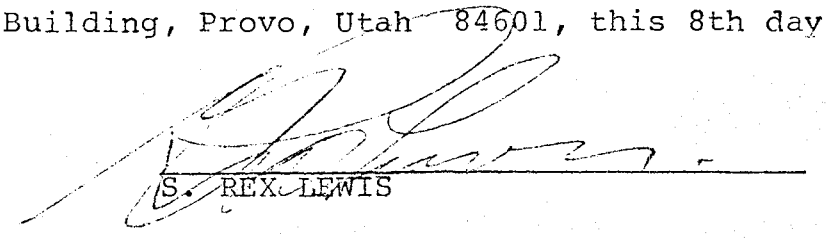
Respectfully submitted,



S. REX LEWIS, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Defendant-Appellant

MAILING CERTIFICATE

I certify that I mailed two (2) copies to each of the following attorneys: Vernon B. Romney, Attorney General, 263 State Capitol Building, Salt Lake City, Utah 84114; and Noall T. Wootton, County Attorney, County Building, Provo, Utah 84601, this 8th day of September, 1975.



S. REX LEWIS